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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5256-08T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DOUGLAS B. HANNA,

Defendant-Appellant.

Submitted February 24, 2010 - Decided March 12, 2010

Before Judges Graves, J. N. Harris, and Newman.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Municipal Appeal No. 030-09.

John Menzel, attorney for appellant.

Theodore F. L. Housel, Atlantic County Prosecutor, attorney for respondent (Jack J. Lipari, Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Defendant Douglas Hanna appeals from an order of the Law Division finding him guilty of driving while intoxicated (DWI), N.J.S.A. 39:4-50. Defendant was sentenced to attend the Intoxicated Driver's Resource Center for twelve hours, and his driver's license was suspended for seven months. In addition,

he was required to pay a total monetary sanction of $664: a $306 fine, $33 for court costs, a $200 DWI surcharge, a $50 VCCB assessment, and a $75 SNSF penalty.

Defendant entered a conditional guilty plea to a per se violation of N.J.S.A. 39:4-50, which was based upon the administration of the Alcotest 7110 MKIII-C system (Alcotest) following his arrest and its subsequent reading of 0.18% blood alcohol concentration (BAC). The Supreme Court has concluded that the Alcotest is generally scientifically reliable and, with the implementation of specified modifications, a properly administered Alcotest provides BAC readings admissible in court to support a per se violation of N.J.S.A. 39:4-50. State v. Chun, 194 N.J. 54, 65, cert. denied, __ U.S. __, 129 S. Ct. 158, 172 L. Ed. 2d 41 (2008); see also State v. Mustaro, 411 N.J. Super. 91, 96 (App. Div. 2009).

Defendant argues that the trial court erred in denying his motion to exclude the Alcohol Influence Report (AIR) because the Alcotest used to analyze his breath samples had not been calibrated during the prior six months as required by Chun. Defendant further argues that the court also erred in denying his motion to vacate his conviction because he was entitled to discovery of downloaded Alcotest results from either a centralized database or from the local municipality, and because

the officer allegedly did not continuously observe him for twenty minutes before administering the test as required. Finally, he claims that he was deprived of the right to fully confront the State's only witness during cross-examination. Because we find none of defendant's arguments persuasive, and we are in substantial agreement with the written opinion of Judge Robert Neustadter dated April 27, 2009, we affirm.

I.

A.

On November 21, 2007, at approximately 1:45 p.m., Egg Harbor Township Police Sergeant Marc A. Romantino arrested defendant for DWI.[1] While en route to police headquarters, defendant told Romantino that he felt like he was having a heart attack. Romantino arranged to have defendant transported by ambulance to the Atlantic City Medical Center, Mainland Division.

Defendant arrived at the hospital at 2:02 p.m. Romantino immediately met defendant in the emergency room and remained constantly in his presence until defendant was released at 3:49 p.m. Romantino testified that defendant did not burp, belch, or ingest anything during that entire time.

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[1] The facts outlined here are derived from the N.J.R.E. 104 hearing in the Egg Harbor Township Municipal Court on December 11, 2008.

Before leaving the hospital, Romantino handcuffed defendant's hands behind his back. He then escorted defendant to the patrol car and helped him get into the rear seat, positioning him on the driver's side. The rear passenger section of the patrol car was separated from the front by a clear partition attached to a steel roll bar. There was a small sliding window in the center of the divider to facilitate communication. According to Romantino, defendant was "under my constant care and observation from the time we left the hospital to the time we arrived at my patrol vehicle."

On the trip to police headquarters, defendant, who Romantino described as "being a gentleman at the time," engaged in a "general, nice conversation" about defendant's ability to drive prior to being placed into custody, the Alcotest device, the procedure about to take place at police headquarters, and about defendant's residence in Florida. Romantino said he could hear defendant clearly, and did not detect defendant belch, burp, regurgitate, or vomit. Romantino did, however, notice that defendant, who had put his face "in that little plexiglass window area . . . as far as he could – as far as he could lean," had what "smelled like two-day old raw Jack Daniels alcohol bad breath." Later, Romantino explained that he did not want to "get pinned down" and described the odor as "[i]t's just bad breath.

It was bad. It was nasty." While driving, Romantino occasionally looked back at defendant and glanced at him through the rear view mirror.

Upon arrival at police headquarters at 4:04 p.m., Romantino assisted defendant in exiting the patrol car and ultimately escorted him into a DWI processing area located in the main building. At 4:12 p.m., Romantino, who was a certified Alcotest operator, administered the breath test using the device. He obtained two breath samples from defendant, the first at 4:12 p.m., and the second at 4:15 p.m. As previously noted, the Alcotest determined defendant's BAC to be 0.18%. Romantino said that just prior to the test, defendant did not burp, belch, or vomit. The Alcotest used to conduct defendant's test had been last calibrated on April 4, 2007, seven months earlier.

B.

After the arrest, but before defendant's trial commenced——on March 17, 2008——the Supreme Court decided Chun and, among other things, required that Alcotest devices be calibrated every six months, and that the State establish a centralized database of such test results.   Defendant moved before the municipal court to exclude the AIR results on the grounds that the Alcotest machine in Egg Harbor Township had not been calibrated within the six-month period, and amended a previous request for

discovery seeking the downloadable data from that particular device. These motions were denied by the municipal court judge.

In November 2008, defendant filed a motion in the Law Division seeking leave to file an interlocutory appeal from the denial of his motion to exclude the Alcotest results based on the failure to semi-annually calibrate the machine in accordance with the requirements in Chun. On November 28, 2008, Judge Neustadter entered an order denying the motion, setting forth that the denial was "made for procedural reasons, and is not a determination on the merits."

On December 11, 2008, the municipal court conducted an N.J.R.E. 104 hearing on the issue of whether the arresting officer had continuously observed defendant for twenty minutes prior to administering the Alcotest. At the conclusion of the hearing, the municipal judge found that the State had established the requisite observation period.

Immediately following the conclusion of the hearing, defendant——a first time offender——entered a conditional guilty plea to a per se violation of N.J.S.A. 39:4-50, based upon the 0.18% BAC reading. Defendant reserved the right to appeal from the denial of his motions to exclude the Alcotest results. The municipal court judge accepted the plea, and sentenced defendant

to the minimum penalties for a first time offender, and then stayed the entire sentence pending appeal.

On January 7, 2009, defendant filed a notice of appeal from the DWI conviction in the Law Division. On April 21, 2009, Judge Neustadter heard the matter de novo. A written opinion was issued on April 27, 2009, affirming the entirety of the municipal court judge's decisions and finding defendant guilty of DWI. This appeal followed.

II.

The standard of review that we apply in an appeal from a finding of guilt during a trial de novo obligates this court to defer to the trial judge's findings of fact if those findings are based upon substantial and credible evidence in the record. State v. Locurto, 157 N.J. 463, 474 (1999). On the other hand, a trial court's interpretation of the law and the consequences that flow from established facts are not entitled to any special deference. Thus, a trial judge's findings "are not entitled to that same degree of deference if they are based upon a misunderstanding of the applicable legal principles." N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427, 434 (App. Div. 2002) (citing Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995)).

Defendant argues that the trial court erred in denying his motion to exclude the AIR (and its reported 0.18% BAC) because the Alcotest used to analyze his breath samples had not been calibrated during the past six months as required by Chun, supra, 194 N.J. at 123. He argues that the language of the Court's opinion compels a retroactive application of the semi-annual calibration requirement, which would result in the application of Chun to this case. We disagree and choose to follow State v. Pollock, 407 N.J. Super. 100, 107 (App. Div. 2009), which conversely held that Chun does not mandate a retroactive application of the six-month calibration requirement.

On March 17, 2008, the Supreme Court ordered the State to "forthwith . . . [c]ommence inspection and recalibration of all Alcotest devices every six months." Chun, supra, 194 N.J. at 153. The Court's use of the word "forthwith" together with its express direction that the State "commence" inspection and calibration on a six-month basis unmistakably reflects the Court's intention that its mandate only have prospective, as opposed to retroactive, effect.

Defendant further argues that the language of the Court's opinion in Chun does compel a retroactive application of the requirement to supply this information in discovery. Additionally, he argues that because the State had not complied

with the requirement to create a centralized database, he was entitled to obtain such information from the local police department. We disagree.

In Chun, the Court found:

> [T]he Special Master recommended, and the parties by and large agree, that the State should create and maintain a centralized database of information regularly uploaded through modem . . . , and that defendants should have access to centrally collected and maintained data on their own cases, as well as to the compiled scientific data on matters involving others that has been redacted to shield the personal information related to those other individuals as appropriate . . . .[] Our review of the record satisfies us that there is substantial, credible evidence that supports the Special Master's recommendation concerning the creation and maintenance of a regularly-updated database, as well as his recommendation relating to providing access to that data to defendants.
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> [Chun, supra, 194 N.J. at 90 (footnote omitted).]

Here, after the decision in Chun, defendant filed a motion in the municipal court seeking to amend his earlier discovery request to additionally ask for downloaded data from the local Alcotest for its entire last calibration cycle. The State objected, arguing that until a statewide database was created it was not incumbent on the municipality to provide downloaded data from its device. The State explained that the local police officers did not have the proprietary passwords to enable them

to redact the personal information from the downloaded results. Defendant countered this claim with the suggestion that the court could enter a protective order barring him from disclosing any unredacted personal information. Additionally, there was anecdotal information suggesting that in order to download material from the Alcotest it would have to be recalibrated, a process that consumed many hours. Thus, if the municipality received numerous requests for downloaded data, the machine would be inaccessible for long periods of time.

The two judges who considered defendant's position rejected the demand for such enhanced and particularized discovery. We believe that those rulings were correct. First, both for practical reasons and for the reasons expressed in Pollock, the Court in Chun compelled only a prospective application of the requirement that the State create a centralized database of Alcotest results. In Chun, there is no reference to the centralized database being applicable to pending cases, nor did the Court set a deadline for the creation of such a database.

Nevertheless, defendant argues that even if the creation of the database is to be applied prospectively, under Chun, he has an interim right to discovery of this information from local alternate sources. There is no reference in Chun to an interim local or non-centralized discovery obligation, and if the Court

had intended to impose such a requirement it could have explicitly done so. In fact, the Court in Chun consistently referred to a centralized——not a localized——database, to be established by the State, not the local police departments or municipalities. Chun, supra, 194 N.J. at 90, 153.

Defendant argues that the trial court erred in denying his motion to exclude the AIR because the State failed to show that the arresting officer continuously observed him for the required twenty minutes before administering the Alcotest, and improperly curtailed his right to cross-examination. Again, we disagree.

Romantino testified that he was continuously in defendant's presence for more than two hours: from 2:02 p.m., when defendant first arrived at the hospital, until 4:12 p.m., when Romantino administered the first of two Alcotest examinations at police headquarters. Romantino testified that during this entire period, defendant did not burp, belch, ingest alcohol, or vomit. There was no evidence to the contrary.

At the conclusion of the N.J.R.E. 104 hearing, the municipal court judge found that under some circumstances the time in which a defendant is transported back to police headquarters can be included as part of the required twenty minutes of continuous observation. The judge explained that if

the

> plexiglass window is closed and the officer could not hear what is going on in the rear of the police car, I don't think that time can be . . . counted as part of the observation period, but in this case where . . . the plexiglass window is open, and where the defendant makes himself available to talk in a very Chatty-Cathy type of way with Sergeant Romantino as he's being transported back to the station, the officer has full view of his face at that point in time and full hearing of what he's saying both verbally and nonverbally what's coming from his mouth . . . . I think that's important in this case because if it were otherwise, I would . . . maybe have a different decision. But I think that that time period can be used.

Further, defendant's hands were handcuffed behind his back the entire time that he was seated in the police car, and thus defendant’s incapacitation prevented the ingestion of any alcohol, gum, or tobacco. Thus, the municipal court judge found that "the officer does not have to be physically looking at the defendant's mouth because the defendant is handcuffed." Under that circumstance, the officer could substantially rely on his auditory sensation as part of the twenty-minute observation period. The judge found that Romantino's testimony "was very explicit and very unequivocal" that he did not hear defendant belch, burp, or regurgitate, and there was no evidence of regurgitation in the back of the patrol vehicle or on defendant. Based upon all of this, the municipal court judge concluded that

Romantino continuously observed defendant from 2:02 p.m., when they arrived at the hospital, to 4:12 p.m., when Romantino administered the Alcotest, a period much greater than the minimally-required twenty minutes.

Judge Neustadter affirmed the municipal court's denial of the motion to exclude the Alcotest results, finding that:

> In the instant case the officer was in the presence of defendant for more than [two] hours prior to the administration of the Alcotest. The two were together from their arrival at the hospital at 2:02 p.m. until the Alcotest was administered at 4:12 p.m. During this time, Sgt. Romantino did not see or hear defendant burp, vomit, regurgitate or imbibe any additional quantities of alcohol. As to Defendant burping or vomiting post arrest, Sgt. Romantino did not hear defendant burp or regurgitate after he was handcuffed and placed in the rear of the squad car. Indeed, the officer spent most of the short trip to the police station engaging him in conversation. Likewise, Defendant did not burp or regurgitate after he had been removed from the squad car and placed in the processing room at the police station.
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> Given these facts regarding the conversation he and Defendant had in the car, coupled with the fact that he was paying attention to whether defendant burped or vomited, it is unlikely that he would have been able to do so without Sgt. Romantino noticing. Further, there was no testimony offered that defendant did, in fact, burp or vomit without the officer noticing.
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> Given the applicable law, the Court finds that it is permissible for an officer to observe a defendant while transporting [him] to a police station.

The Law Division reviews the municipal court record de novo, and makes its own findings of fact, giving due——although not necessarily controlling——regard to the opportunity of the municipal judge to evaluate witness credibility. R. 3:23-8(a); State v. Johnson, 42 N.J. 146, 157 (1964); State v. Cerefice, 335 N.J. Super. 374, 382-83 (App. Div. 2000).

Appellate courts should defer to trial courts' credibility findings. Locurto, supra, 157 N.J. at 474. The rule of deference is more compelling where, as in this case, the municipal and Law Division judges made concurrent findings on credibility. Ibid. "Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and exceptional showing of error." Ibid.

The Court in Chun stated that the operator's role in administering the Alcotest included, in part, "observing the subject to ensure that twenty minutes has passed and to be certain that the subject has neither swallowed nor regurgitated any substances during that time that would influence the test results." Chun, supra, 194 N.J. at 79. Admissibility of the Alcotest results, in part, is dependent upon proof that the Alcotest was "administered according to official procedure." Id. at 134.

Therefore, at trial the State must establish by clear and convincing evidence that during the twenty minutes immediately preceding the administration of the Alcotest, the defendant did not ingest, regurgitate or place anything in his or her mouth that might compromise the reliability of the test results. See State v. Ugrovics, 410 N.J. Super. 482, 489-90 (App. Div. 2009); State v. Filson, 409 N.J. Super. 246, 257 (Law Div. 2009).

We are satisfied that the trial court's conclusion that confirmed a more-than-twenty-minute observation of defendant immediately before the administration of the Alcotest was soundly based upon clear and convincing evidence, and is logically unassailable. Romantino's level of observation was sufficient to accomplish the material purpose of the requirement, namely to ensure that defendant did not ingest, regurgitate or place anything in his mouth that might compromise the reliability of the Alcotest results.

Moreover, we recently held in Ugrovics that the State can establish the requisite twenty-minute observation period under Chun through the testimony of "any competent witness," not just the certified Alcotest operator. Ugrovics, supra, 410 N.J. Super. at 490. "To construe the twenty-minute observation requirement as bestowing upon the operator the exclusive responsibility to monitor the test subject elevates form over

substance and places an importance on the operator that is inconsistent with what the Chun Court envisioned to be his or her diminished role." Ibid. Thus, the court found that a literal interpretation of the language in Chun "would create an unduly and, in our view, unintended restriction on the State's ability to prosecute DWI cases based on the results of an Alcotest." Ibid.

Similarly here, a reading of Chun to exclude observations made by an officer driving a police car, where the officer was attentive to the defendant's actions and whose testimony, as found by the municipal court judge, "was very explicit and very unequivocal," would be inconsistent with the clear purpose of the observation period, which is to ensure that the test was not contaminated by mouth alcohol and other foreign substances.

Finally, defendant argues that he was deprived of his constitutional right to confrontation on two separate occasions during the N.J.R.E. 104 hearing. First, during cross examination defense counsel asked Romantino "[w]hen you're in polite society and you have an urge to burp or belch, what do you do?" The State objected on the basis of "relevance as to what this officer does when he's in polite society." Counsel rephrased the question and instead asked, "[i]n your experience, officer, you would agree that in polite society most people

would try to suppress burps and belches?" The State again objected on the basis of relevance. The court sustained the objection noting that "it's irrelevant as to what happens in polite society."

An appellate court will not interfere with the trial court's exercise of discretion in circumscribing the scope of cross-examination "'unless clear error and prejudice are shown'" State v. Wakefield, 190 N.J. 397, 452 (2007), cert. denied, 552 U.S. 1146, 128 S. Ct. 1074, 169 L. Ed. 2d 817 (2008) (quoting State v. Murray, 240 N.J. Super. 378, 394 (App. Div.), certif. denied, 122 N.J. 334 (1990)). We do not find that defendant was deprived of any relevant evidence that might have been engendered by Romantino's recitation of his view of social manners and etiquette.

The second alleged confrontation violation occurred during cross-examination, when Romantino testified that defendant's breath was "pretty bad" and that it smelled like "two-day old raw Jack Daniels alcohol bad breath." Defense counsel asked Romantino if the smell emanated from defendant's mouth, to which Romantino responded, "[o]h, absolutely. No other orifices or anything else, just his mouth." Defense counsel then asked whether the smell "could have come from [defendant's] stomach." The State objected on the basis that the question called for

"speculation on the part of the witness," and the municipal court judge sustained the objection.

Questions that invite a witness to speculate on an answer are generally excluded. Biunno, Current N.J. Rules of Evidence, Comment on N.J.R.E. 611 (2009). Once again, we see no deprivation of defendant's right to confrontation by the truncation of this line of questioning, and can conceive of nothing that would amount to the exclusion of the Alcotest results in this case.

The balance of defendant's arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION